

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LINDA KELLY,
Appellant,

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
Agency.

DOCKET NUMBER
DA07528910478

DATE: NOV - 7 1990

Robert R. Smith, American Federation of Government
Employees, Tulsa, Oklahoma, for the appellant.

Franklin H. Upp, Dallas, Texas, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board upon the agency's petition for review of the November 3, 1989, initial decision, which reversed its action removing the appellant from her position. For the reasons discussed below, the Board GRANTS the agency's petition for review under 5 C.F.R. § 1201.115, AFFIRMS the initial decision in its finding that the agency's charge is sustained, and REVERSES the initial decision in its finding that the appellant established discrimination based on

handicap. The agency's removal action, however, is NOT SUSTAINED, and a 90-day suspension is ORDERED in its place.

BACKGROUND

The appellant petitioned the Board's Dallas Regional Office for appeal of the agency's action removing her from the position of Claims Representative, GS-10, based on "illegal conduct, i.e., theft, on two occasions." See Agency File, Tabs 4b and 4f. The charge arose out of the appellant's convictions of off-duty shoplifting on May 26, 1988, and February 22, 1989.¹ In effecting the appellant's removal, the agency also considered two elements of her past disciplinary record, a one-day suspension in December 1988 and a reprimand on September 23, 1988, both for tardiness. *Id.* at Tabs 4g and 4h.

On appeal to the Board's regional office, the appellant contended, in pertinent part, that she suffered from a handicapping condition (emotional disorder), and that the penalty of removal was not within the limits of reason. See Appeal File, Tab 1. Following a hearing, the administrative judge issued an initial decision reversing the agency's removal action. She found the charge supported by the preponderance of the evidence, based on the appellant's stipulation and the undisputed documentary evidence. The

¹ The appellant was fined \$200.00 and received a "deferred adjudication of guilt probation for 6 months" for the May 18, 1988, incident. See Agency File, Tab 4f. For the December 8, 1988, instance of shoplifting, the appellant was given a \$300.00 fine and three days in jail. *Id.* Both charges involved misdemeanor theft. *Id.*

administrative judge found, however, that the appellant had established that she had a handicapping condition, mental disorder, which caused her to engage in the unacceptable behavior substantially limiting her major life activities by interfering with her availability for work. See Initial Decision (I.D.) at 10. The administrative judge further found that the agency failed to accommodate her handicapping condition by allowing her an opportunity for rehabilitation.

In its petition for review, the agency contends, inter alia, that the appellant is not a qualified handicapped individual and that she could not be accommodated without undue hardship. The appellant has responded to the petition for review, contending that the initial decision is correct.

ANALYSIS

The appellant has not shown that she is a handicapped employee entitled to reasonable accommodation.

An appellant in a removal appeal who raises the affirmative defense of handicap discrimination has the burden of proving this defense by a preponderance of the evidence. 5 C.F.R. § 1201.56. See *Clancy v. Department of the Navy*, 5 M.S.P.R. 196, 199 (1981). The appellant must prove not only that she suffers from a handicapping condition, but that the condition caused her misconduct. See, e.g., *Conti v. Department of the Army*, 34 M.S.P.R. 272, 277 (1987); *Myers v. Department of the Air Force*, 28 M.S.P.R. 479, 480-81 (1985).

The appellant may generally establish a prima facie case of handicap discrimination by: (1) Showing that she is a handicapped person under 29 C.F.R. § 1613.702(a), and that the action appealed was based on handicap; and (2) to the extent possible, articulating a reasonable accommodation under which the appellant believes she could perform the essential duties of her position or of a vacant position to which she could be reassigned. See *Savage v. Department of the Navy*, 36 M.S.P.R. 148, 151-52 (1988). The mere existence of a mental or physical impairment alone, however, is not sufficient to constitute a handicapping condition. See *Lehman v. Department of the Army*, 30 M.S.P.R. 72, 75 (1986).

A "handicapped person" is defined, in part, at 29 C.F.R. § 1613.702(a), as one who has a physical or mental impairment which substantially limits one or more of such person's major life activities.² The regulations further define mental impairment as "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1613.702(b)(2). We find that the appellant has failed to establish a prima facie case of handicap discrimination because she has not shown that she is a "handicapped person" under 29 C.F.R. § 1613.702(a).

² "Major life activities" means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1613.702(c).

Even if we accept the appellant's medical evidence as establishing that she has a mental disorder, there is no showing that it limits a major life function. See 29 C.F.R. § 1613.702(a). The medical record from the appellant's psychiatrist, W. Henao, M.D., shows that the appellant suffers from atypical depression and that she "tends to manipulate facts to suit her own needs, behavior which often ends up to her disadvantage." See Agency File, Tab 4c. At the Board hearing, the appellant testified regarding her personal problems, concluding that they exacerbated her stress-related emotional disorder culminating in the shoplifting incidents. See Hearing Tape (H.T.) 3. She did not, however, provide testimony as to limitations on any major life activity, as defined in 29 C.F.R. § 1613.702(c).

A clinical neuropsychologist, Jack Fletcher, Ph.D., testified at the hearing that the appellant's affective disorder, i.e., depression, was a long-standing problem, and that it was exacerbated by a series of events, as described by the appellant. H. T. 4. He further testified, however, that the appellant could care for herself and that she knew what she was doing when shoplifting, that the appellant could separate her shoplifting behavior from her behavior on the job, and that she distorts events to meet her own needs. *Id.* On re-direct, the psychologist replied affirmatively to the appellant's representative's statement that the impulsive act of stealing was poor judgment and decision-making, that it was an example of self-defeating behavior, and that the

appellant's problem-solving skills were impaired. *Id.* Dr. Fletcher did not, however, link the appellant's depression to significant limitations on specific major life activities. *Id.*

Thus, we find that the totality of the evidence is insufficient to warrant a finding that the appellant is a "handicapped person" under 29 C.F.R. § 1613.702(a). The appellant has failed to carry her threshold burden of establishing by the preponderance of the evidence that she had a mental condition or emotional illness which substantially limited her ability to work or another major life function. See *Savage*, 36 M.S.P.R. at 152; *McKoy v. Federal Communications Commission*, 10 M.S.P.R. 221 (1982); *Powers v. Department of Health and Human Services*, 7 M.S.P.R. 619, 621 (1981). The administrative judge found that the appellant's mental disorder substantially limited her major life activities by interfering with her availability to work. Initial Decision at 10. She did not specify, however, the evidence that linked the condition to that life activity, and upon complete review of the record, we find no evidence to support that finding. As the agency notes in its petition, neither the appellant's misconduct nor her mental condition has been shown to have interfered with her availability to work.

Since the appellant did not establish that she is a handicapped person, the agency was under no obligation to accommodate the appellant, and any failure to do so could not constitute handicap discrimination. See, e.g., *Lehman*, 30 M.S.P.R. at 76.

The penalty of removal exceeds the bounds of reasonableness.

Because we have reversed the administrative judge's finding that the appellant proved her affirmative defense of handicap discrimination, we must review the penalty to determine whether the sustained charge warrants the penalty of removal. See *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981) (the Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness). We find that the nature of the appellant's off-duty misconduct, although serious, does not outweigh the *Douglas* factors favorable to the appellant, including her 23 years of government service, her satisfactory performance ratings, and her potential for rehabilitation.³ While the appellant is employed in a position of trust involving management of government funds with the Social Security Administration, her misconduct did not affect the

³ Dr. Henao stated that continuing psychotherapy would help the appellant, see Agency File, Tab 4c, and Dr. Fletcher testified that the appellant's emotional difficulties could be minimized or eliminated with continued therapy and that the test results were not consistent with a pattern of recurrent criminal behavior. H.T. 4; I.D. at 8.

continuing performance of essential and fundamental functions of her position. Nor is there evidence that the appellant's offense will have a lasting effect upon her ability to perform her duties at a satisfactory level. See *Smith v. U.S. Postal Service*, 31 M.S.P.R. 508, 510 (1986). Importantly, the items the appellant took did not come into her possession as a result of her position with the Social Security Administration. See *DeWitt v. Department of the Navy*, 747 F.2d 1442, 1445 (Fed. Cir. 1984) (appellant gained control over the item he stole as a direct result of his job responsibilities), cert. denied, 470 U.S. 1054 (1985). No evidence was presented to link the appellant to any work-related thefts. In addition, her mental condition is a factor to be considered in determining the appropriateness of the penalty. See *Faint v. U.S. Postal Service*, 22 M.S.P.R. 495, 498 (1984), *aff'd*, 770 F.2d 179 (Fed. Cir. 1985) (Table).

Therefore, under the circumstances, we find that a 90-day suspension is the maximum reasonable penalty to promote the efficiency of the service. 5 U.S.C. § 7513(a). The sustained charge, coupled with the appellant's relatively minor past record, does not demonstrate such pervasive conduct that a 90-day suspension would not deter future misconduct and be an effective sanction. See *Hawkins v. U.S. Postal Service*, 35 M.S.P.R. 549 (1987); *Goode v. Defense Logistics Agency*, 31 M.S.P.R. 446 (1986); *Lampack v. U. S. Postal Service*, 27 M.S.P.R. 468 (1985); *Davis v. Department of the Treasury*, 8 M.S.P.R. 317 (1981); *Douglas*, 5 M.S.P.R. at 306.

ORDER

We ORDER the agency to cancel the appellant's removal and to replace it with a ninety-day suspension. See *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance

issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Review and Appeals
1801 L Street, N.W., Suite 5000
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court.

See 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.